

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Application of	)	
	)	
ABUNDANT LIFE, INC.	)	File No. BPH-930208MA
	)	
For a Construction Permit for a New FM Station	)	
at Hattiesburg, Mississippi	)	Facility ID No. 330

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 2001

Released: February 26, 2001

By the Commission:

1. Unity Broadcasters ("Unity") has filed an Application for Review of the May 11, 2000 decision ("Letter Ruling") by the Mass Media Bureau ("Bureau") denying Unity's Petition to Deny the Application of Abundant Life, Inc. ("ALI") for a construction permit for a new FM station at Hattiesburg, Mississippi ("Petition").<sup>1</sup> For the reasons set forth below, we deny Unity's Application for Review.

2. **Background:** Unity and ALI both participated in Closed Broadcast Auction No. 25, which commenced on September 28, 1999. They were the only bidders in FM Mutually Exclusive ("MX") Group 76 in that auction, for a construction permit for a new FM broadcast station at Hattiesburg, Mississippi. ALI entered a gross bid of \$879,000, less a 35% new entrant credit, and was the winning bidder for the construction permit.

3. On December 13, 1999, Unity timely filed a Petition to Deny ALI's application for the Hattiesburg construction permit. Unity alleged that ALI falsely certified its financial qualifications in its original application by stating that it had \$150,000 in financing committed from Mt. Carmel Missionary Baptist Church ("Church") when, according to Unity, Church was neither legally able to make such a loan nor had actually approved the loan. After ALI filed its opposition to the Petition, the staff sent ALI an inquiry letter requesting further information concerning the steps it had taken to finance its proposed station (as well as information regarding ALI's incorporation, based on questions that arose from ALI's opposition to the Petition).<sup>2</sup> ALI requested and received two extensions of time, of two weeks and one week, respectively, in which to respond to the inquiry letter, filing its response on March 10, 2000. Unity thereafter filed Comments to ALI's response to the inquiry letter.<sup>3</sup> On May 11, 2000, the Bureau issued

<sup>1</sup> *Letter to Unity Broadcasters and Abundant Life, Inc.*, Ref. No. 1800B3-TSN (Mass Media Bureau, May 11, 2000).

<sup>2</sup> *Letter to Ann C. Farhat, Esq.*, Ref. No. 1800B3-TSN (Mass Media Bureau, February 7, 2000).

<sup>3</sup> Unity complains that the Bureau improperly granted ALI's second, non-consensual request for an extension of time in which to respond to the staff's inquiry letter (Unity did not object to ALI's first request for a two-week extension). In the inquiry letter the staff requested a response by February 17, 2000; the response was filed March

its Letter Ruling, finding that Unity had not met its burden of producing credible evidence sufficient to create a substantial and material question of fact as to ALI's alleged false financial certification. Unity timely filed an application for review of the Letter Ruling.

4. **Discussion: Unity's Pleading Burden:** Unity first argues that the Bureau applied an erroneous standard in ruling on its Petition, contending the Bureau held that Unity "had to prove that ALI had made a false certification" (emphasis in original) in order to prevail. Contrary to Unity's assertion, we do not find that the Bureau applied an erroneous evidentiary standard in concluding that Unity had failed to raise a substantial and material question of fact. In determining whether a hearing is required, we must determine whether the petitioner has made allegations of fact which, if true, would demonstrate that granting the application would be *prima facie* inconsistent with the public interest. We must also determine whether the evidence presented suffices to raise a substantial and material question of fact as to whether grant of the application would serve the public interest. *Astroline Communications Co. v. F.C.C.*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) ("*Astroline*"). *But see Mobile Communications Corp. of America v. F.C.C.*, 77 F.3d 1399, 1410 (D.C. Cir. 1996) (court has "never said that the Commission must plod through the two steps on pain of being reversed"; the *Astroline* determinations are typically made concurrently, and negative resolution of the second determination makes the first moot, citing *Citizens for Jazz on WRVR v. F.C.C.*, 775 F.2d 392 (D.C. Cir. 1985)). This is the standard the Bureau relied upon when it considered whether "Unity's evidence [rose] to the level necessary to find a substantial and material question of fact regarding false certification, as is required by 47 U.S.C. §309(d)." For the reasons set forth below, we conclude that the Bureau correctly applied this standard.

5. **False Certification of Financial Qualifications:** Unity presents for our review an issue as to whether ALI was financially qualified at the time it submitted its original application in February of 1993. Specifically, Unity argues that under the case law that applied in 1993, when ALI and Unity originally filed their Hattiesburg applications, ALI could not demonstrate that it was financially qualified, as it did not possess the documentation required under pre-auction precedent. *See, e.g., Aspen FM, Inc.*, 6 FCC Rcd 1602 (1991). Unity contends further that ALI knew it was not financially qualified when it filed its original application in February 1993, and nonetheless falsely certified its financial qualifications in the application.

6. As the Bureau stated in the Letter Ruling, we will no longer entertain petitions to deny based on allegations of lack of financial qualifications for construction permits to be awarded under our new competitive bidding procedures. *First Report and Order, In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses* ("*Broadcast First Report and Order*"), 13 FCC Rcd 15920, 15951-52, 15956, ¶¶85, 99 (1998). In the *Broadcast First Report and Order*, the Commission made a policy decision that it would no longer require voluminous background documentation, of the type referenced by Unity, in order to satisfy ourselves that a bidder is financially qualified. "It is [the winning bid payment requirements and default provisions], rather than the original certifications, that serve as a mechanism to discourage insincere proposals. For this reason, adjudicating issues relating to whether the winning bidder had reasonable assurance of site availability or was financially qualified would waste the resources of the Commission and of the parties and would serve only to delay service to the public." *Broadcast First*

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10, 2000. While under 47 C.F.R. §1.46 we do not routinely grant extensions of time, in the instant case we find that there was good cause to extend the time by a total of three weeks, both to accommodate ALI's counsel's medical treatments and to permit the full development of the record in this case. *See, e.g., Fanch Cablevision of Colorado*, 12 FCC Rcd. 6034, 6035 (1997); *Cable Texas, Inc. v. Energy Services, Inc.*, 13 FCC Rcd 5733 (1998). Accordingly, we find that the Bureau's consideration of the Comments filed by Unity with regard to ALI's response to the inquiry letter was also proper, and that the Bureau's implicit grant of leave to file said Comments was likewise proper.

*Report and Order*, 13 FCC Rcd at 15956. Thus, Unity's reliance on pre-auction financial qualification cases is misplaced. ALI has timely made the required upfront and down payments, totaling \$114,270. Thus, further consideration of this issue at this time is unwarranted. Moreover, we agree with the Bureau that the evidence ALI submitted in support of the accuracy and candor of its financial certification fully resolved any questions concerning that certification. Accordingly, we find that ALI did not falsely certify its financial qualifications.

7. *Corporate Formation*: ALI's opposition to the Petition included the affidavit of its local attorney, Herbert Irvin ("Irvin Affidavit"), who testified that the corporation was formed in May 1993, some three months after it filed its application.<sup>4</sup> In response to the staff's inquiry letter, Irvin filed a further declaration ("Irvin Declaration") in which he stated that he was asked to incorporate ALI before it filed its application, but failed to do so in a timely manner due to a heavy caseload and family obligations.<sup>5</sup> Irvin indicated that ALI's principals were not aware of his failure to incorporate ALI until they attempted to obtain a copy of the Charter of Incorporation from him in May of 1993, whereupon he promptly rectified the failure to incorporate.<sup>6</sup> Unity does not provide any evidence to contradict the testimony that ALI's failure to incorporate prior to filing its application was inadvertent.

8. While a corporation's existence is a relevant Commission inquiry, *see, e.g., Cosmopolitan Enterprises, Inc.*, 47 FCC 2d 325, 326 (1974), it is also true that we generally will not deny an application based on a licensee or permittee's non-compliance with state corporate law "where no challenge has been made in the State courts and the determination is one that is more appropriately a matter of State resolution." *North American Broadcasting Co., Inc.*, 15 FCC 2d 979, 983 (Rev. Bd. 1969). *See also Fatima Response, Inc.*, 14 FCC Rcd 18543, 18546 (1999), in which we held we would not deny the application of a self-described *de facto* California corporation when its status was not challenged in state court. The record establishes that ALI promptly corrected the corporate filing error upon discovery, and that this issue was fully resolved several years before Unity petitioned to deny ALI's application on this basis.<sup>7</sup> Further Commission consideration of this issue is thus unwarranted.

9. Unity also alleges that ALI misrepresented its corporate formation, stating in its original application that it was incorporated in Mississippi on February 5, 1993. As noted, this statement was incorrect, and the evidence discloses no basis for ALI's listing this particular date as that on which it believed it had been incorporated. However, Unity has failed to provide any support for its speculative claim that ALI intended to deceive the commission regarding the status of its incorporation. While ALI should have been more punctilious in verifying its corporate status before filing its application, the record does not support a finding that ALI's actions rose to the level of intentional misrepresentation. *See, e.g., Pinelands, Inc.*, 7 FCC Rcd 6058, 6066 (1992); *WIOQ(FM)*, 8 FCC Rcd 6400, 6405 (1993).

10. *Tower Registration*: In the Letter Ruling the Bureau indicated that it could not list ALI's application as being ready for grant, as ALI failed to provide either evidence of a determination of no hazard by the Federal Aviation Administration or evidence that it had registered its proposed broadcast tower. By letter dated July 11, 2000, ALI's counsel provided both the FAA no-hazard determination and the tower registration number. We therefore find ALI is fully qualified to be a Commission licensee, and

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<sup>4</sup> Irvin Affidavit, ¶ 9.

<sup>5</sup> Irvin Declaration, ¶ 3.

<sup>6</sup> Irvin Declaration, ¶¶ 4-5.

<sup>7</sup> We note that while ALI promptly corrected the incorporation oversight, it did not immediately alert the Commission of its initial error, or the correction. Immediate notification is the preferred course of action.

thus direct the Mass Media Bureau to list ALI in a subsequent Public Notice announcing that the construction permit for the above-captioned facility is ready to be granted pending receipt of ALI's final payment. *Broadcast First Report and Order*, 13 FCC Rcd at 15985-86.

11. **Conclusion / Action:** For the foregoing reasons, the Application for Review filed by Unity IS DENIED; and the Chief, Audio Services Division, Mass Media Bureau, IS HEREBY DIRECTED to list ALI's Application for FM Broadcast Station on Channel 226A at Hattiesburg, Mississippi in a Public Notice announcing that the construction permit for said facility is ready to be granted.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Román Salas  
Secretary